

Bovis Lend Lease LMB, Inc. v Admiral Indem. Co.
2009 NY Slip Op 30755(U)
March 31, 2009
Supreme Court, New York County
Docket Number: 106056/07
Judge: Michael D. Stallman
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Index Number : 106056/2007

BOVIS LEND LEASE LMB INC

vs.

ADMIRAL INDEMNITY COMPANY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

PART 7

tics

INDEX NO. _____

MOTION DATE 1/6/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 12

The following papers, numbered 1 to 4 were read on this motion to/for SJ

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-0

Answering Affidavits — Exhibits _____

Replying Affidavits - Exhibit A

PAPERS NUMBERED

1-2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the amended memorandum opinion (Decision, Order and Judgment)*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

HON. MICHAEL D. STALLMAN

Dated: 3/31/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 2]
SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7

-----X
BOVIS LEND LEASE LMB, INC. and NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA.,

Index No.: 106056/07

Decision, Order
and Judgment

Plaintiffs,

- against -

ADMIRAL INDEMNITY COMPANY (related to
the underlying action entitled Lucchese,
et ux. v. Bovis Lend Lease LMB, Inc.,
et al.),

Defendant.

-----X
HON. MICHAEL D. STALLMAN, J.:

BACKGROUND

Plaintiffs, Bovis Lend Lease LMB, Inc. (Bovis) and National Union Fire Insurance Company of Pittsburgh, Pa. (National Union), move, pursuant to CPLR 3212, for summary judgment declaring that: (1) defendant has a duty to defend and indemnify them in an underlying labor law personal injury action; (2) defendant has a duty to reimburse plaintiffs for the expenses incurred with respect to defending that underlying Labor Law personal injury action; and (3) an inquest be set down to hear and determine the amount of the legal fees for which defendant is obligated to reimburse plaintiffs.

Bovis contracted with the City of New York to serve as the construction manager for the New York City Hall of Science Museum. On December 4, 2001, Bovis entered into a trade contract with RP Brennan to perform ornamental metal work at the project.

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RP Brennan then subcontracted a portion of its work to Medway Construction, Inc. (Medway). The terms of the Medway subcontract specifically incorporate the terms and conditions contained in the trade contract between Bovis and RP Brennan (Plaintiffs' Exhibit E). The attachment to the Bovis-RP Brennan contract states, in paragraph 6, that Medway will maintain the insurance coverage required for the project. To fulfill this obligation, Medway obtained commercial general liability coverage from defendant Admiral Indemnity Company (Admiral).

In section 1, paragraph 1.a, the insurance policy in question states that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." This same section states that the insurer has the "duty to defend the insured against any 'suit' seeking those damages." The policy applies to an occurrence that takes place in the coverage territory.

In paragraph 4 of the policy in question (Plaintiffs' Exhibit L), Admiral states that it is to provide the primary insurance coverage for Medway and any additional insureds named under the policy, except in limited situations which are inapplicable here. Bovis is named as an additional insured.

Pursuant to an endorsement to the policy, Admiral states that its coverage is to be excess to any other policy under which Medway

[* 4]
is named as an additional insured (Plaintiffs' Exhibit L).

According to the complaint for the underlying personal injury action, on March 21, 2003, during the period in which the subject policy was in effect, Bernard Lucchese (Lucchese) was under the employ of a contractor retained to inspect the concrete and rebar work performed at the project site. Lucchese was injured when a portion of the rebar he stepped on rolled, causing him to fall. Allegedly, the concrete and rebar work was being performed by Medway at the time of the accident. This occurrence took place at the job site for which the above-referenced insurance policy was issued.

National Union is currently providing commercial general liability insurance coverage to Bovis as a named insured, and is currently defending Bovis in the underlying action filed by Lucchese. According to National Union, under its policy its coverage is excess to the coverage Medway has agreed to furnish.¹

Admiral has opposed the instant motion on two grounds: (1) Bovis has failed to name all necessary parties to this lawsuit, to wit, the other parties sued by Lucchese and their insurance carriers; and (2) the action is premature because no liability has yet to be found in the underlying personal injury action.

¹ Although a copy of this policy has not been provided, this assertion is not disputed.

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DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' motion is granted to the extent of declaring that Admiral has a duty to defend Bovis in the underlying action, and that plaintiffs are entitled to reimbursement for the legal fees expended in defending the underlying action to date.

"A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured [and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. ... Furthermore, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.

...
[A]n additional insured is a recognized term in insurance contracts, ... [and that] the well-understood meaning of the term is an entity enjoying the same

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protection as the named insured [internal quotation marks and citations omitted]."

BP Air Conditioning Corp. v One Beacon Insurance Group, 8 NY3d 708, 714-715 (2007).

The complaint in the underlying personal injury action alleges that Lucchese suffered bodily injury at the job site covered by the insurance policy in question, caused by the negligence of Bovis, an additional insured under the Medway policy. As such, Admiral has a duty to defend Bovis, pursuant to the provision of the policy referenced above.

Admiral's argument, that the other parties and their insurers named in the underlying action must be named in the instant lawsuit before a determination regarding an obligation to defend may be rendered, is misplaced.

As the court said in *Continental Casualty Co. v Rapid-American Corp.* (80 NY2d 640, 655-656 [1993]),

"the duty to defend is broader than the duty to pay, requiring each insurer to defend if there is an asserted occurrence covered by its policy, and the insured should not be denied initial recourse to a carrier merely because another carrier may also be responsible. That is the 'litigation insurance' the insured has purchased. When more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered, but we perceive no error or unfairness in declining to order such sharing, with the understanding that the insurer may later obtain contribution from other applicable policies [internal citations omitted]."

Furthermore, Admiral's argument that its coverage may be excess rather than primary because other insurance may be available

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is inapplicable. The policy states that Admiral's coverage is only excess when other insurance coverage is available to Medway, the insured. The insurance coverage argued by Admiral as being necessary to this lawsuit pertains to other parties to the underlying action, not to Medway. There is no evidence that Medway was named as an additional insured under those policies, nor has that been alleged. Consequently, that provision in Admiral's policy that would make its coverage excess does not pertain to the instant matter.

Additionally, Admiral's argument that the contract between Medway and RP Brennan does not incorporate an obligation to provide insurance coverage is also unavailing.

As a general rule of law,

"[u]nder New York Law, incorporation clauses in a construction subcontract, incorporating prime clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor [internal quotation marks omitted]."

Waitkus v Metropolitan Housing Partners, 50 AD3d 260, 261 (1st Dept 2008). However, in the instant case, Medway specifically incorporated the insurance coverage provisions of the main contract into its agreement with RP Brennan, and so the general rule regarding incorporation by reference clauses in construction contracts does not here apply.

Therefore, based on the foregoing, Admiral has a duty to reimburse plaintiffs for expenses incurred to date in defending the

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underlying personal injury action, and to provide the defense for the remainder of that action.

However, Admiral's contention that this action is premature with respect to indemnification is correct.

"[W]hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify [Bovis]." *Chunn v New York City Housing Authority*, 55 AD3d 437, 438 (1st Dept 2008). Therefore "we decline to pass on the question of defendant['s] duty to indemnify at this early juncture, which predates any ultimate determination of the insurers' liability." *Frontier Insulation Contractors, Inc. v Merchants Mutual Insurance Company*, 91 NY2d 169, 178 (1997).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiffs' motion seeking a declaration that defendant has a duty to defend plaintiffs in the underlying personal injury action is granted; and it is further

ADJUDGED and DECLARED that defendant has a duty to defend plaintiffs in the underlying personal injury action entitled *Bernard Lucchese v Bovis Lend Lease LMB, Inc. et al.*, Index No.: 117248/04, pending in the Supreme Court, New York County, is granted; and it is further

ORDERED that the portion of plaintiffs' motion seeking a declaration that defendant has a duty to indemnify them in the aforesaid underlying personal injury action is severed and denied as premature; and it is further

ORDERED that the issue of the amount of reimbursement of legal fees to which plaintiffs are entitled is severed and referred to a Special Referee to determine the issue, except that, in the event of and upon the filing of a stipulation of the parties, another person designated by the parties shall serve as referee to determine the aforesaid issue; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to notify counsel for all parties to the reference as indicated on the Information Sheet, and to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: March 31, 2009
New York, New York



Michael D. Stallman, J.S.C.

HON. MICHAEL D. STALLMAN

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).